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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JOHN DOWNEY, Defendant and Appellant.	B203490 (Los Angeles County Super. Ct. No. VA094391)

APPEAL from a judgment of the Superior Court of Los Angeles County, Beverly O'Connell, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

John Downey was convicted of transportation of a controlled substance, possession for sale of a controlled substance and possession of marijuana for sale. Upon Downey's admissions, the trial court found true multiple prior conviction allegations and sentenced Downey to a term of six years in state prison. Downey appeals, claiming the trial court erred in denying his motion to disclose the identity of a confidential informant; the court erred in admitting evidence of a search warrant; his trial counsel was ineffective; the prosecutor committed misconduct; the evidence was insufficient to support his conviction for possession of marijuana for sale; and cumulative error deprived him of a fair trial. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

On March 6, 2006, Detective Manuel Felix watched as Downey exited the house at 17402 Brink Avenue in Norwalk and got into a tan Ford Windstar minivan. Los Angeles County Sheriff's deputies were conducting surveillance at the location in order to serve a narcotics search warrant which expressly identified Downey, the house he left and the minivan he was driving. Felix followed Downey to a Lowe's store. When Downey left the store, Felix directed Deputy James Delgado to conduct a traffic stop on Downey.

When the deputy stopped Downey in the minivan and searched him, he found a blue Ziploc baggie in Downey's right front shorts pocket containing a white crystalline substance later confirmed to be .38 grams of methamphetamine.

The detective returned to the Brink Avenue residence to execute the search warrant. Patricia Prieto answered the door and said she was the owner. She said Downey lived alone in the detached garage of the residence. In their search of the garage, deputies found a glass cup on a shelf containing 10 Ziploc baggies, each containing

methamphetamine, and 2 more Ziploc baggies, each containing plant material (later confirmed to be 3.16 grams of marijuana); two operational digital gram scales; 3 separate packages, each containing 20 to 30 new Ziploc baggies; and several pieces of mail, including bills, addressed to Downey with the Brink Avenue address. Laboratory analysis later confirmed two baggies contained 5.28 grams of a crystalline solid substance containing methamphetamine; other baggies contained .53 grams of a crystal solid material and two other bags held powder residue.

Detective Felix searched Downey and found a wallet in his shorts pocket holding a driver's license in Downey's name plus $438 in varying denominations. He also had a cell phone (which rang about five times when he was initially searched). The key chain in the ignition of the van held a key that opened the lock on the door of the detached garage. The garage looked "lived in," with men's clothing appearing to be Downey's size as well as leftover food strewn around the bed and floor. In addition to the mail in Downey's name, there were photos of Downey in the garage as well. Deputies searched the house and all of its residents and found no narcotics or any other contraband.

Downey was charged with transportation of a controlled substance in violation of Health and Safety Code section 11379, subdivision (a) (all further undesignated statutory references are to the Health and Safety Code) (count 1); possession for sale of a controlled substance in violation of section 11378 (count 2); and possession of marijuana for sale in violation of section 11359 (count 3). It was also alleged Downey had three prior convictions within the meaning of Penal Code section 667.5, subdivision (b), and two prior convictions within the meaning of sections 11370 and 11370.2.

At trial, the People presented evidence of the facts summarized above. In addition, Detective Felix opined that several facts indicated the methamphetamine and marijuana found in Downey's room were possessed for the purpose of sale. The methamphetamine seized was packaged in 11 individual containers, ready for immediate street sale and distribution. The two scales and multiple individual baggies also suggested that the scales were used to weigh individual portions of methamphetamine

and marijuana and then package these individual portions for immediate street sale. In his experience, .38 grams of methamphetamine was a usable amount. The search disclosed no pipes or smoking devices or any other indicia of personal narcotics use. The "large" amount of U.S. currency in varying denominations and cell phone were also indicative of street sales.

In Downey's defense, Jesse Alvarez testified it was he (and not Downey, his friend for 20 years) who was living in the garage on the date of Downey's arrest. He said he lived there from February 2 through May, 2006, although he also lived at his parents' address at that time. He said he had nothing to document that he lived there but said he paid rent to Prieto.

The afternoon before the search, he testified, he met two girls named Gidget and Tammy in a bar, and they spent the night in the garage with him. He passed out from drinking, then left at 5:00 a.m. the next morning and went to work, with the two women still in the garage, sleeping. Although he did not know their last names or phone numbers and he did not give them his phone number, he said Gidget called for him the next day at Prieto's house and said she had left her "eight ball," scales, baggies and marijuana in the garage. He had never seen any drugs, but Gidget did have a purse (about 10 inches in size). He said he was later shocked to hear Downey was arrested when Prieto told him later that day but did not tell the police or anyone else the drugs belonged to Gidget (or speak with Downey) until shortly before he testified (more than a year after the search).

Patricia Prieto testified that, on the day of the search, she told the detective Downey did *not* live there. She testified Alvarez lived in the garage at that time. She said Alvarez had dinner with her and her family the night before the search (and there was no indication he had been drinking). She met Downey when he started dating her daughter four or five years before. She said he never lived in her garage, then testified he "stayed there a lot with [her] daughter," then testified he did live there, but it was Alvarez who was there at the time of the search. No one called for Alvarez at her house the next

day. Downey used Prieto's mother's van for work and borrowed it on the day of the search.

There was no paperwork found in the garage with the name "Jesse Alvarez" and no items that appeared to belong to a woman such as a purse.

The jury found Downey guilty as charged. Downey admitted the prior conviction allegations, and the trial court found them true. The trial court sentenced Downey to a term of six years in state prison—the mid-term of three years on count 1, plus three years pursuant to section 11370.2, subdivision (a). The court imposed concurrent three-year terms on counts 2 and 3. (The parties stipulated Downey had served one prison term, and the trial court dismissed the Penal Code section 667.5, subdivision (b) allegation.)

Downey appeals.

DISCUSSION

1. The Trial Court Properly Denied Downey's Motion to Disclose the Identity of the Confidential Informant.

Prior to trial, defense counsel sought disclosure of the identity of the confidential informant who provided the basis for the search warrant in this case, arguing it appeared the informant had "intimate knowledge of what's going on at the house. By the police report there were five people found at the location." The informant "may be connected to the drugs themselves. They may have gotten arrested for some reason. They may have given up where their evidence is stashed, who they're working with, and it may be some of the other adults who live at this location, not Mr. Downey." According to Detective Felix's statement of probable cause in support of the search warrant (obtained three days before the search), the informant reported that two individuals, "John" and "Eddie," who lived at the 14702 Brink Avenue address, had been selling and delivering methamphetamine in the Bellflower/Norwalk area for the last year. The trial court denied the motion, finding nothing to indicate the informant was a percipient witness and

nothing to indicate any evidence to exonerate Downey. The court commented that Downey was searched away from the residence and found with methamphetamine in his pocket. Then the car keys taken from Downey were taken back to the garage, where Prieto said Downey lived, and used to open the deadbolt on the garage.

As we observed in *People v. Alderrou* (1987) 191 Cal.App.3d 1074, 1078: "Evidence Code section 1042, subdivision (d) describes the procedure to be followed and the standards to be applied when a defendant moves to require disclosure of the identity of a confidential informant." This provision specifies as follows: "When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes

that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial."

The defendant must allege the informant is a "material witness" on the issue of guilt, but "that is not the crucial standard. The last sentence of Evidence Code section 1042, subdivision (d) *prohibits* the court from ordering disclosure *unless* 'the court concludes that there is a *reasonable possibility* that nondisclosure *might* deprive the defendant of a *fair trial*.'" (*People v. Alderrou, supra,* 191 Cal.App.3d at p. 1080, original italics.) As the trial court observed, as to the transportation count, Downey was searched away from the residence and found with methamphetamine in his shorts pocket.

As for the possession for sale counts, as we observed in *Alderrou,* Downey did not have to have *sole* dominion and control of the narcotics, and, as in that case, "one would have to engage in wild speculation about convoluted improbable plots to come up with a scenario which would produce testimony tending to exonerate this appellant of this offense." (*People v. Alderrou, supra,* 191 Cal.App.3d at p. 1083.) As described in the *Alderrou* case, the informant would have to be in a position to testify that one or more of the occupants of the house somehow had exclusive dominion and control over the drugs and other materials in the garage while Downey had none. "This kind of 'Alice in Wonderland' scenario does not rise to the level of a 'reasonable possibility' and thus is not grounds for requiring the disclosure of the identity of the confidential informant." (*Ibid.*) We conclude the nondisclosure of the informant's identity did not deprive Downey of a fair trial.[1]

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[1] The parties indicate that our Supreme Court has granted review in *People v. Gaines* (Aug. 29, 2007, B192177 [nonpub. opn.], review granted Nov. 28, 2007, S157008) to determine the applicable standard of review. It appears, however, that review in that case was limited to whether reversal or remand for a showing of prejudice is the appropriate remedy for a trial court's erroneous denial of a *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) (The People also refer us to the transcript of the in camera hearing, but the trial court in this case did not conduct an in camera hearing.) In any event, under either a de novo or abuse of discretion standard (see

II. Downey Has Failed to Demonstrate Prejudicial Error in the Trial Court's Admission of Evidence of the Search Warrant.

Citing Evidence Code section 352, defense counsel objected to the prosecution's introduction of evidence officers were at the Brink Avenue location to execute a search warrant naming Downey. The trial court ruled the prosecution could establish Downey was named in the warrant and this was the reason he was stopped but could not describe the basis for the search warrant.

Even if the trial court had erred in admitting such evidence, Downey could not possibly establish prejudice in light of the overwhelming evidence of his guilt in this case. As summarized above, Downey was stopped with methamphetamine and a large amount of cash in his pocket. The key in the ignition of the van he drove also held the key that opened the lock on the Brink Avenue garage residence, where quantities of methamphetamine and marijuana, scales and numerous baggies were found, along with mail in Downey's name. At the time the warrant was served, Prieto said Downey lived alone in the garage. The jury clearly rejected the incredible defense testimony to the contrary at the time of trial. Having reviewed the record in this case, we conclude it is not reasonably probable Downey would have obtained a more favorable result had the evidence to which he objects been excluded. (*People v. Watson* (1956) 46 Cal.2d 818.)

III. Downey Has Failed to Demonstrate Prejudicial Error as a Result of Ineffective Assistance of Counsel.

According to Downey, he was prejudiced by defense counsel's failure to request a limiting instruction directing the jury not to consider the evidence of the search warrant

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People v. Gordon (1990) 50 Cal.3d 1223, 1245-1246), we are satisfied Downey has failed to demonstrate error in this regard.

for any purpose other than providing context for the officers' encounter with him. We disagree.

First, as the People argue, where the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, the claim must be rejected on appeal unless counsel was asked for an explanation and failed to provide one or unless there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Moreover, as we explained in the preceding section, the evidence of Downey's guilt in this case was overwhelming. Accordingly, Downey cannot establish prejudice as required in support of his ineffective assistance of counsel claim. (*People v. Frye* (1998) 18 Cal.4th 894, 979.)

IV. Downey Was Not Prejudiced By Prosecutorial Misconduct.

According to Downey, when the prosecutor indicated in her closing argument that a search warrant is signed by a judge, she relied on it as circumstantial evidence of his guilt and violated the court's order regarding the scope of admissibility of the search warrant. We disagree.

The prosecutor properly commented on the evidence introduced at trial. Even assuming error in the prosecutor's mention that a judge signed the warrant, jurors are assumed to have understood and followed the trial court's instructions that the prosecution had to prove each element of the charges against Downey beyond a reasonable doubt. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) In light of the overwhelming evidence of Downey's guilt, it is not reasonably probable Downey would have obtained a more favorable result absent the closing argument references to the warrant. (*People v. Frye, supra,* 18 Cal.4th at p. 976.)

V. Downey's Conviction for Possession of Marijuana for Sale Is Supported by Substantial Evidence.

According to Downey, Detective Felix's opinion was insufficient evidence to support a conviction for possession of marijuana for sale. We disagree. An experienced officer may state his opinion that narcotics are held for the purpose of sale, based on such matters as quantity, packaging and normal use of an individual. (*People v. Newman* (1971) 5 Cal.3d 48, 53, disapproved on another ground in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) Contrary to Downey's characterization, Detective Felix's testimony addressed not only the methamphetamine found at the location but also the marijuana, plus the scales and baggies—as well as the absence of any indication of personal use at the location. Downey has failed to demonstrate error.[2]

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J. **JACKSON, J.**

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2 In light of our conclusions regarding Downey's claims of error, it follows that his claim of cumulative error must fail as well.